



Contracts

Did I Ever Really “Have a Deal”?

In *Ruparell v. J.H. Cochrane Investments Inc. et al*, 2020 ONSC 7466, a case set against the backdrop of the COVID-19 pandemic, the Plaintiff sought to purchase the shares and land of a Markham Volkswagen dealership. In late April 2020, a few days after the dealership representative had confirmed by phone that the parties “had a deal,” the dealer received another offer that was \$5 million higher from another buyer, which they accepted. The Plaintiff then sued the dealership for breach of contract and registered a Certificate of Pending Litigation on title to the land. In response, the dealership argued that no enforceable agreement had been reached as the share purchase agreements had not yet been finalized or executed.

The central issue at trial was whether an enforceable agreement existed between the parties and whether the “enforceability” of the agreement was dependent on a review of the manner in which the parties had negotiated the transaction and communicated with each other.

At trial and later, on appeal, the Plaintiff prevailed and was awarded damages. Both courts found that an agreement had been reached, despite never being formalized in a written and executed Share Purchase Agreement. Even though the only written deal document had been an informal term sheet exchanged via email, in conjunction with text messages between the parties, it was found the parties had concluded the essential terms of the transaction – those terms being “the price, share sale, financing, security, timing of payment, asset valuation, post-closing adjustments and retaining the general manager to work for the new company” – had been agreed upon by the parties by telephone.

In reviewing the law, the trial judge stated, “when parties agree on the essential provisions to be incorporated in a formal document with the intention that their agreement is binding, they will have fulfilled all the requisites for a contract. The fact that a formal written document will be prepared and signed later does not alter the binding nature of the original contract.” The trial judge further stated, “the intention of the parties at the time of the agreement, must be determined by examining the words, the nature of the purported agreement, and the course of conduct of the parties. It is an objective test, as seen through the eyes of a “hypothetical onlooker” rather than based on the subjective impressions of the parties after the fact.” However, if what was agreed to is uncertain, or where the parties do intend there to be no binding agreement until a formal contract is executed, then there is no enforceable agreement.

The trial judge found that the term sheet did not provide that the parties agreed they would not be bound until the Share Purchase Agreements were finalized and signed. Furthermore, following the telephone call when the



essential terms were agreed to, the parties acted as if they had reached an agreement and proceeded to make arrangements for a closing to give effect to the agreement they had reached over the phone.

In the Province of Ontario, the *Statute of Frauds RSO 1990, c. S. 19* requires that agreements in land, such as agreements of purchase and sale, must be put in writing and signed by the defendant to be enforceable. The written document can be in the form of a memorandum or note, “provided that all the essential terms of the contract are contained in the appropriate note or memorandum.” Also, with Ontario’s *The Electronic Commerce Act, 2000*, which states that a contract is not invalid or unenforceable by reason only of being in electronic form and with the use of electronic signatures being readily created on any mobile device, it’s clear that you must be extremely cautious when negotiating real estate transactions, such as agreements of purchase and sale, leases, or otherwise in this manner.

As a result of COVID-19, most business transactions and business communications have transitioned to an electronic platform, with the absence of in-person meetings and corresponding proliferation of texts and emails. So, it is very important to be aware that all of the text messages and emails you send can be construed as binding you to a contract. In these circumstances, it is prudent that you make any negotiations conditional upon entering into a formal contract or upon lawyer review, to minimize the likelihood of binding yourself to a contract that you haven’t fully considered or don’t understand.

